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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1593

GULF OIL CORPORATION, SCALLOP NUCLEAR INC.,
and
GENERAL ATOMIC COMPANY,
Petitioners

v.

PENNSYLVANIA POWER & LIGHT COMPANY,
Respondent

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PENNSYLVANIA POWER & LIGHT COMPANY,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Pennsylvania Power & Light Company ("PP&L") opposes the Petition for Writ of Certiorari to the Superior Court of Pennsylvania submitted by Gulf Oil Corporation, Scallop Nuclear Inc., and General Atomic Company ("petitioners"). The petitioners have presented no special or important reasons for the granting of the writ. Not only are the due process issues presented by the petitioners well settled, but the petitioners' failure to establish a sufficient factual record and the availability of *voir dire* make consideration of the issues they have sought to raise unnecessary.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania is reported unofficially at 411 A. 2d 1203 (Pa. Super. 1979). It is not yet officially reported.

In all other respects, PP&L is satisfied with the petitioners' presentation of the opinions below.

JURISDICTION

PP&L is satisfied with the petitioners' presentation regarding the jurisdiction of this Court.

CONSTITUTIONAL PROVISION INVOLVED

PP&L is satisfied with the petitioners' presentation of the constitutional provision involved.

QUESTION PRESENTED

Whether the Court should allocate its resources to a consideration of the merits of a case in which the well established legal standards were properly applied, the petitioners failed to meet their burden of proving that any potential jurors have an adverse interest, and a fair and impartial jury is guaranteed by the availability of *voir dire*.

STATEMENT OF THE CASE

1. Nature of the Case

This litigation involves an ordinary contract dispute between PP&L, a public utility with its headquarters in Lehigh County, Pennsylvania, and the petitioners. In PP&L's view, a binding contractual commitment was entered by PP&L and the petitioners' predecessor company

in late 1973. Under the contract, PP&L was to receive uranium and fabricated fuel assemblies for use in two nuclear reactors it is presently constructing.

Within a year after the contractual agreement was entered, but before deliveries were to begin, the petitioners repudiated the agreement. PP&L filed suit against them in November 1974, seeking damages resulting from their breach of the contract and demanding a jury trial. The action was brought in the Court of Common Pleas of Lehigh County, Pennsylvania, which is the trial court for the county in which PP&L's principal place of business is located. The petitioners answered the complaint by asserting that no contractual agreement had ever been reached. Issue was thus joined in the form of a breach of contract case involving a private disagreement between the parties. After several years of discovery, the trial court has now set a trial date of September 22, 1980, and except for the Petition for Writ of Certiorari, this five-and-a-half-year-old case is essentially ready for trial.

2. The Two Petitions for Change of Venue

Shortly after suit was filed, the petitioners asked the trial court for an order changing venue from Lehigh County. They asserted that they could not receive a fair trial in Lehigh County because, in their view, most of the County's residents are customers of PP&L whose electric rates might be affected by a substantial damages award to PP&L. The petitioners based their request on a Pennsylvania statute governing changes of venue; no reliance was placed upon the due process clause of the Fourteenth Amendment. The trial court denied the requested change of venue in March 1976.[1]

1. The order appears at page A32 as Appendix D to the Petition for Writ of Certiorari.

Over a year and a half after the denial, the petitioners asked the trial court to reconsider its venue ruling.[2] In addition to relying once again on the Pennsylvania venue statute, the petitioners maintained for the first time that the due process clause required a change of venue. Other than specifying the damages that PP&L had identified in an interrogatory answer and including the due process claim, the petitioners' argument on the motion for reconsideration was the same as their argument on the first petition.[3] The petitioners asserted that both the statute and the due process clause gave them the right to have the case tried outside of Lehigh County.

Several depositions were taken by the parties in connection with the renewed venue motion. On June 21, 1978, the trial court denied the request for reconsideration.[4] That ruling was later certified for interlocutory appeal to the Superior Court of Pennsylvania, which accepted the appeal in December 1978 and issued its unanimous *en banc* affirmance in September 1979. *Pennsylvania Power & Light Co. v. Gulf Oil Corp.*, 411 A. 2d 1203 (Pa. Super. 1979) (A1-A27). The petitioners' subsequent petition for allowance of appeal to the Supreme Court of Pennsylvania was denied in January 1980, and the filing of the Petition for Writ of Certiorari followed.

2. In their implication on page 4 of the Petition that this request for reconsideration of the initial venue ruling was actually the first petition for a change of venue, the petitioners have omitted a portion of the procedural history of the case.

3. The petitioners correctly state in footnote 1 of the Petition, at page 4, that PP&L later increased its damages claim. They were informed of that fact in a supplemental interrogatory answer filed by PP&L. In its first damages interrogatory answer, PP&L had reserved the right to supplement the answer at a later date.

4. The order appears at pages A28-A29 as Appendix B to the Petition for Writ of Certiorari. Paragraph 5 of the order relates to the venue question.

3. The Decision of the Superior Court of Pennsylvania

In a meticulous opinion, the Superior Court carefully scrutinized the factual record developed at the trial court level and analyzed both the Pennsylvania venue statute and the due process clause in light of the record and of the many applicable judicial decisions. It concluded that a change of venue was not warranted under either authority. The court's conclusion rested on the following determinations, some of which are contrary to the version of the "facts" supplied by the petitioners on pages 4 through 6 of the Petition: [5]

> 1. "The fact that a person is a customer of PP&L does not by itself mean that he has an interest adverse to [the petitioners]." (A16)
>
> 2. Whether PP&L will pass any recovery through to its customers depends upon a future decision by the Pennsylvania Public Utility Commission. The nature of that decision cannot be predicted with any certainty. "Thus there can be no present benefit to PP&L customers but only the possibility of a future benefit. As such the customers' interest is speculative." (A17)
>
> 3. The petitioners' proof at the trial court level failed to show that any benefit to PP&L's customers would be substantial or that a venireman would immediately get a sum certain. They were able to show, at best, that someone who remains a PP&L customer

5. While the petitioners state in the Petition that certain "facts" were "established" by deposition testimony taken on the venue question, the "facts" they purport to set forth are more accurately described in some instances, such as "facts" (3), (4), and (5), either as statements made by certain deponents but not others or as the petitioners' inferences from the testimony. The Superior Court's view of such "facts" in some respects diverged from that of the petitioners.

may receive some benefit over a period of years through reduced electric rates. This level of interest is not substantial. (A17-A18)

4. *No evidence* was presented by the petitioners that "Lehigh County veniremen believe, or, when the jury would be selected, would believe, that they will benefit from a recovery of damages by PP&L." (A20)

5. Because the petitioners failed to demonstrate that the jurors of Lehigh County have, and believe they have, an interest adverse to the petitioners, the petitioners' due process rights have not been abridged. (A26-A27)

As a result of its thorough assessment of the factual record, and in light of the well established rules of law governing the due process issue, the Superior Court affirmed the judgment of the trial court.[6] (A26-A27)

6. The Superior Court also affirmed on the basis of the Pennsylvania venue statute, which of course has not been brought to this Court for review. That statute will be repealed as of June 27, 1980 and be replaced by a new venue statute. Act of April 28, 1978, P. L. 202, No. 53, §§ 2(a), 4(b), 42 Pa. Stat. Ann. §§ 20002 (a) [657] (repeal), 20004(b) (effective date); Act of July 9, 1976, P. L. 586, No. 142, § 2, 42 Pa. Cons. Stat. § 5106 (new statute).

ARGUMENT

This case does not present major questions of public importance. It is a private breach-of-contract action with no particular implications for anyone other than the parties themselves. The due process issue arises in a factual context that is not likely to be duplicated in the future with any frequency—that of a public utility plaintiff seeking substantial damages in a civil jury trial in a county that is partially within its service area.

In particular, there are three substantial reasons why the Court should not grant the writ. The due process standards are already well settled and were properly applied by the lower court; the issue that the petitioners seek to bring to this Court is not properly presented on the factual record developed at the trial court level; and in any event, because of the availability of *voir dire* at trial, the issue need not and should not be reached.

1. The Applicable Due Process Standards Are Well Settled and Were Properly Applied by the Lower Court

The petitioners maintain on pages 10 through 12 of the Petition that a decision is needed on the meaning of the due process clause in the very narrow context of a civil litigant's rights where potential jurors may have an adverse pecuniary interest. By that exceedingly narrow casting of the "issue," the petitioners are able to state that neither this Court nor the federal or state appellate courts have ruled on the precise question they have sought to present. But the narrow phrasing of the question should not be allowed to obscure the fact that the due process issue has been addressed by this and other courts in closely parallel situations, and that those decisions are fully applicable here. Even assuming that the issue were properly presented in this case, there is thus no need for this Court to issue an opinion when the law is so well settled in areas

virtually identical to the narrow one carved out by the petitioners.

This Court's decisions establish the level of due process protection to which parties are entitled in criminal, administrative, and related contexts when the finder of fact is alleged to have an interest in the outcome. The cases distinguish direct, personal, and substantial pecuniary interests from those that are remote, trifling, and insignificant. *See, e.g., Connally v. Georgia,* 429 U. S. 245, 250 (1977) (per curiam); *Gibson v. Berryhill,* 411 U. S. 564, 579 (1973); *Ward v. Village of Monroeville,* 409 U. S. 57, 60-61 (1972); *Dugan v. Ohio,* 277 U. S. 61, 63-65 (1928); *Tumey v. Ohio,* 273 U. S. 510, 523, 532 (1927). *Cf. Marshall v. Jerrico, Inc.,* No. 79-253 (April 28, 1980) (reaffirming *Tumey* doctrine in distinguishable context of prosecutor's remote interest). It has not mattered whether the finder of fact is a jury, a judge, or something else. *See Withrow v. Larkin,* 421 U. S. 35, 46-47 (1975) (referring to "administrative agencies," "courts," "decisionmaker," "judge," and "adjudicator" in context of decision by board of physicians). A jury challenge very similar to that here has been squarely rejected by a federal court in a case involving a substantial monetary claim by a public utility. *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.,* 389 F. Supp. 568 (E. D. Va. 1975).[7]

7. The petitioners suggest that a decision by this Court is needed because they believe the *Virginia Electric* decision to be in conflict with *Long Island Lighting Co. v. New England Petroleum Corp.,* 80 Misc. 2d 183, 362 N. Y. S. 2d 350 (Sup. Ct. 1974). Petition at 10-11. There is no actual conflict between the decisions.

Unlike both the present case and *Virginia Electric,* the result in *Long Island* was predicated in large part on the presence of pre-trial publicity through which potential jurors were advised, whether correctly or not, that a recovery by the electric company plaintiff would result in a rebate to its customers, including jurors. 80 Misc. 2d at 184-85, 362 N. Y. S. 2d at 352-53. That limitation on the *Long Island* holding was confirmed by the court in *County of Nassau v. Southside Hospital,* 89 Misc. 2d 1063, 1065, 393 N. Y. S. 2d 512, 514 (Sup. Ct. 1977). Beyond that, the venue change in

The absence of decisions in the very narrow situation posed by the petitioners is irrelevant, given the many opinions in closely related areas. The standards developed in those areas are fully applicable here, and they may readily be applied to the facts presented by individual cases.[8] *Cf. Jenkins v. McKeithen,* 395 U. S. 411 (1969) (relying on due process cases in criminal, civil, and administrative areas to apply due process in quasi-criminal context). Nor is it of concern, as the petitioners suggest, that a precise rule has not been devised, for one could not be. The level of a disqualifying "interest cannot be defined with precision. Circumstances and relationships must be considered." *In re Murchison,* 349 U. S. 133, 136 (1955). But the guidelines needed to enable the lower courts to apply the due process clause have been amply developed. Further interpretation by this Court is not needed.[9]

7. (Cont'd)
Long Island was made on the basis of a state venue statute, not the due process clause, and the defendant in *Virginia Electric* grounded its request for a venue change in its Seventh Amendment right to an impartial jury.

In addition, of course, the *Virginia Electric* and *Long Island* decisions were handed down by two trial courts, not by two United States Courts of Appeals. Even if they conflicted, then, they would be outside the scope of the considerations identified in this Court's Rule 19(1)(b).

The Consent Order in *Consumers Power Co. v. Combustion Engineering, see* Petition at 10 n. 11 and A43-A44, can be of no relevance here. It was entered by consent of the parties, and Judge Miles expressly stated that the potential jurors "may potentially be influenced" by an order of the Michigan Public Service Commission "specifically referring to this litigation and the possible effect of its resolution on plaintiff's ratepayers . . . ."

8. The petitioners concede this position by implication. After asserting on pages 10 to 12 of the Petition that the particular issue has not been resolved by this Court, they contend on pages 12 to 15 that the decisions of this Court are sufficiently analogous that the Superior Court's ruling "conflicts in principle" with them. There is thus an apparent inconsistency in the two arguments made by the petitioners.

9. This is particularly true in view of the uncommon factual situation presented—an electric utility company as a plaintiff in its

Finally, the Superior Court's decision does not conflict with the law established by this Court. The petitioners believe, Petition at 13, that the Superior Court failed to apply what they describe as the "slightest pecuniary interest" test of *Tumey v. Ohio*, 273 U. S. 510 (1927); yet that language in *Tumey* was merely a reference to a test developed in the English cases, *id.* at 524. The Superior Court correctly applied the standard actually developed in *Tumey*, which, as stated above, is whether the finder of fact has a direct, personal, and substantial pecuniary interest in the outcome. *Id.* at 523. Even if the Superior Court had misapplied *Tumey*, there would be no reason to grant the writ in this private breach-of-contract action decided in the context of a well settled principle of law, for it is not this Court's function simply to correct the decisions of the lower courts. The Court does not "sit for the benefit of the particular litigants," *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74 (1955), but it grants the writ of certiorari only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties," *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387, 393 (1923).

9. (Cont'd.)

home county, seeking substantial damages in a civil jury trial. It is not likely that that posture will recur frequently enough to make it worthwhile for the Court to devote its resources to this case. The Court recognized this to be so 25 years ago:

> But this Court does not sit to satisfy a scholarly interest in such issues. . . . [The] "[s]pecial and important reasons" [language of this Court's Rule 19] impl[ies] a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U. S. 70, 74 (1955).

The due process standards are well established. It is not necessary for this Court to use its important time to hand down yet another decision on the subject.

2. The Issue That the Petitioners Have Requested the Court to Decide Is Not Properly Presented on the Record in This Case

The due process question that the petitioners have sought to raise is not ripe for resolution on the record developed in this case. As recognized by the Superior Court, the petitioners offered no evidence whatsoever that the potential jurors of Lehigh County believe, or that the actual jurors would believe, that they would benefit from a damages recovery by PP&L (A20), and it is not realistic to assume that such a belief exists. (A20-A21) Without any evidence in the record that such a belief would be present, there cannot be a due process violation; jurors who are unaware that a particular outcome might result from the verdict could not seek to reach or avoid that outcome.[10]

Even if the petitioners have suggested by implication that the Superior Court's analysis of the factual record was incorrect, the writ should not be granted. It is not the office of a writ of certiorari to bring up for review a case in which the Court will be asked to look behind the factual determinations made by the lower court. In the words of Mr. Justice Holmes, the Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U. S. 220, 227 (1925).

10. As pointed out on pages 5-6 above, the petitioners' view of the state of the record is not entirely identical to the Superior Court's. *Cf. Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 509 (1924).

3. *Voir Dire* Is Available to Remove Prospective Jurors Who Actually Have and Maintain an Interest Adverse to the Petitioners

There is no need for the petitioners to fear that they may have to go to trial before jurors who actually have an interest adverse to them. Prospective jurors may be examined about their views on *voir dire* and, if appropriate, may be removed from the jury venire altogether. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd,* 366 U. S. 717, 723 (1961). When potential jurors with a demonstrated adverse interest have been removed from the jury panel or have laid their opinions aside, a fair and impartial jury will have been selected and the petitioners' speculation about bias will have been rendered moot.

Voir dire has been endorsed as a means of securing a fair and impartial jury in a variety of contexts. *See, e.g., Dobbert v. Florida,* 432 U. S. 282, 301-03 (1977) (*voir dire* relating to pretrial publicity in criminal case); *Ham v. South Carolina,* 409 U. S. 524 (1973) (*voir dire* relating to racial prejudice against defendant in criminal case where racial issues were inextricably involved in the conduct of the trial); *Witherspoon v. Illinois,* 391 U. S. 510 (1968) (*voir dire* relating to jurors' attitudes about imposition of death penalty).[11] *Cf. Adams v. Texas,* 577 S. W. 2d 717 (Tex. Crim. App. 1979), *cert. granted,* No. 79-5175 (Dec. 10, 1979) (argued March 24, 1980, decision pending) (applicability of *Witherspoon v. Illinois* to Texas jury selection system). The petitioners certainly enjoy the protection of *voir dire* in this case.

11. This Court's decisions thus demonstrate the fallacy of the petitioners' argument, Petition at 14 n. 16, that *voir dire* will create the very prejudice that the petitioners wish to avoid.

In addition, it would be particularly inappropriate for this Court unnecessarily to reach the constitutional issue before the parties have had an opportunity to moot that question by "cleansing" the jury at trial through the *voir dire* process. *Cf. Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 345-48 (1936) (Brandeis, J., concurring).

CONCLUSION

For all of the reasons set out above, PP&L urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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